1
REP

(2)

FILED
MAR 13 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1060

In the Supreme Court of the United States

BRIAN BELLEQUE, Superintendent, Oregon State Penitentiary,

Petitioner,

v.

ROBERT SANFORD DIETRICH,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
*MARY H. WILLIAMS
Solicitor General
JANET A. METCALF
Assistant Attorney General
1162 Court Street
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Petitioner

*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

A. Respondent fails to respond to significant points made in the petition. 1

B. Equitable tolling is not available to excuse the untimely filing of a section 2254 habeas petition. 3

C. The Ninth Circuit set the bar for obtaining an evidentiary hearing far too low; its approach conflicts with that of other circuits. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases Cited

Baldwin v. Reese,
541 U.S. 27 (2004) 6

Behrens v. Pelletier,
516 U.S. 299 (1996) 9

Belleque v. Kephart
(06-1015) 2, 9, 10

Iowa Mutual Ins. Co. v. LaPlante,
480 U.S. 9 (1987) 9

Iowa Mutual Ins. Co. v. LaPlante,
774 F.2d 1174 (9th Cir. 1985) 9

Kentucky v. Stincer,
482 U.S. 730 (1987) 4

Kokkonen v. Guardian Life Ins. Co.,
511 U.S. 375 (1994) 9

Lawrence v. Florida,
___ U.S. ___ (2/20/07) 7

Laws v. Lamarque,
351 F.3d 919 (9th Cir. 2003) 2

Miranda v. Castro,
292 F.3d 1063 (9th Cir. 2002) 4

New Hampshire v. Maine,
532 U.S. 742 (2001) 6

Pace v. DiGuglielmo,
544 U.S. 408 (2005) 5, 7

Roberts v. Galen of Va., Inc.,
525 U.S. 249 (1999) 6

Spectrum Sports, Inc. v. McQuillan,
506 U.S. 447 (1993) 9

Spitsyn v. Moore,
345 F.3d 796 (9th Cir. 2003) 4

Sprietsma v. Mercury Marine,
537 U.S. 51 (2002) 6

United States v. Beggerly,
524 U.S. 33 (1998) 7, 8

United States v. Brockamp,
519 U.S. 347 (1997) 7, 8

United States v. Janis,
428 U.S. 433 (1976) 9

United States v. Martin,
408 F.3d 1089 (8th Cir. 2005) 2

Vance v. Terrazas,
444 U.S. 252 (1980) 5

Constitutional and Statutory Provisions

28 U.S.C. § 2244(d) 10

28 U.S.C. § 2244(d)(D) 8

28 U.S.C. § 2254(d)(1)(B) 8

REPLY BRIEF

A. Respondent fails to respond to significant points made in the petition.

It is notable that the brief in opposition ignores and does not take issue with some important points made in the petition for a writ of certiorari. What is first striking is not what the brief in opposition says, but what it fails to address.

If equitable tolling applies at all in this AEDPA context, the petition asserts that the Court of Appeals for the Ninth Circuit erred in accepting that mere attorney negligence and a failure to communicate can amount to an extraordinary circumstance that would warrant equitable tolling. (Pet. Cert. 10). The petition also contends that the Ninth Circuit's decision in this regard conflicts with the decisions of most other courts of appeals, which also are in analytical conflict with each other. The petition outlines that conflict and describes the various positions that different federal courts of appeals have taken. (Pet. Cert. 15-19). Most circuits that have considered the issue have held that attorney negligence, such as the failure to notify a client of the denial of state post-conviction relief or misadvice about the AEDPA statute of limitations, is not an extraordinary circumstance that warrants equitable tolling. (Pet. Cert. 15-18) (citations omitted). Other courts have taken other positions, some stricter and others not. (Pet. Cert. 18-19) (citations omitted). In its petition, the State asked this Court to issue a writ of certiorari to resolve the circuit conflict and to determine when, if ever, attorney negligence, misconduct, misadvice, or a failure to communicate with a client can amount to an extraordinary circumstance justifying equitable tolling (Pet. Cert. 19-20).

Other than asserting that "[to]lling must * * * remain available when tardiness is directly attributable to an otherwise diligent prisoner's mental incompetency or the extreme

neglect or malfeasance of one's lawyer," (Opp. Br. 7; citations omitted), respondent ignores the State's argument. He does not contend that anything more than attorney negligence and an alleged failure to communicate is involved in this case. And he does not dispute that there is a circuit split regarding when, if ever, attorney negligence, misrepresentation, and malfeasance may be enough to justify equitable tolling, assuming the doctrine applies in the AEDPA context.[1]

Relying in part on its petition for a writ of certiorari in *Belleque v. Kephart* (06-1015), the State also contends that the Ninth Circuit has set the bar far too low for obtaining an evidentiary hearing on equitable tolling. (Pet. Cert. 20). The State demonstrated in its petition that there also is a circuit split regarding how much of a showing is required to obtain an evidentiary hearing on a claim of equitable tolling. (Pet. Cert. 20-22) (citations omitted). The State argued that in this case the Ninth Circuit compounded the error it made in *Kephart* by taking an approach that is inconsistent with and even less demanding than that taken by the court in that case. (Pet. Cert. 22). Here, the Ninth Circuit ordered an evidentiary hearing because it was 'unclear to what extent, *if any,* respon-

---

[1] The cases respondent cites (Opp. Br. 7-8) do not in any way undermine the State's position. *Laws v. Lamarque*, 351 F.3d 919 (9th Cir. 2003), is inapplicable. It deals with a *habeas* petitioner's alleged incompetency. *United States v. Martin,* 408 F.3d 1089 (8th Cir. 2005), is cited in the State's petition as an example of the divergent analyses that the circuit courts of appeals have applied to claims of attorney negligence or misconduct and as an example of a decision that "appear[s] to apply an analys[i]s that approximates the one employed by the Ninth Circuit in this case." (Pet. Cert. 19). Thus, that it might appear to support respondent's position is hardly surprising.

dent had been hindered by the [post-conviction appellate] attorney's alleged failure to communicate. (Pet. App. 15) (emphasis added). Demanding so little from a habeas petitioner in order to obtain an evidentiary hearing will waste federal judicial time and resources, and force the States into unnecessary evidentiary hearings. (Pet. Cert. 23).

In his brief in opposition, respondent again ignores the circuit split. He does not contend that it does not exist. He also does not disagree that the Ninth Circuit is reaching inconsistent results with regard to whether evidentiary hearings must be held on claims of equitable tolling. He does not dispute that the Ninth Circuit ordered an evidentiary hearing in this case even though there was no allegation that a causal connection existed between the attorney's alleged failure to communicate and respondent's late filing of his federal habeas petition.[2]

B. Equitable tolling is not available to excuse the untimely filing of a section 2254 habeas petition.

The State contends that the Ninth Circuit erred in holding that equitable tolling is available to excuse the otherwise untimely filing of a section 2254 habeas petition. (Pet. Cert. 11-14). Respondent's rejoinder is two-fold. The State did not raise this issue in the courts below; indeed, in respondent's view the State's "current argument contradicts [its] own argument before the district court." (Opp. Br. 3). And "it is settled that the [AEDPA] statute of limitations is subject to equitable tolling." (Opp. Br. 4). Neither claim should dissuade this Court from granting certiorari to decide the extremely important issue of whether equitable tolling applies in cases brought under section 2254.

---

[2] The responses he does offer are addressed below.

As to respondent's first point, the State admitted in its petition that it had not raised the no-equitable-tolling argument in either the district court or the Ninth Circuit. (Pet. Cert. 11). But the Ninth Circuit's decision is necessarily based on the conclusion that equitable tolling applies in this context. The court cited two of its own earlier decisions holding that equitable tolling is available in cases brought under section 2254. (Pet. Cert., App. 14, citing *Miranda v. Castro*, 292 F.3d 1063 (9th Cir. 2002), and *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003)). In *Miranda*, the court noted that it had "recognized that AEDPA's statute of limitations provision is subject to equitable tolling." 292 F.3d at 1066 (citation omitted). In *Spitsyn,* the court observed that it had "held that the one-year statute of limitations for filing a habeas petition may be equitably tolled[.]" 345 F.3d at 799. That equitable tolling is available in cases brought under section 2254 is a necessary underpinning of the Ninth Circuit's decision in this case.

The State's failure to have explicitly raised the issue earlier does not preclude this Court's review. As discussed, the Ninth Circuit's decision necessarily rests on the conclusion that equitable tolling is available. It is "the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed *or passed upon* in the courts below." *Kentucky v. Stincer,* 482 U.S. 730, 747 n. 22 (1987) (internal quotation marks and citations omitted; emphasis added). Here, the Ninth Circuit in effect "passed upon" the issue of whether equitable tolling is available in this federal habeas corpus context.

Respondent is simply incorrect when he asserts that in the district court the State "endorsed" the idea that equitable tolling applies and that the State's present position somehow "contradicts" its earlier arguments. (Opp. Br. 2, 3). It is true

that in the courts below the State did not directly challenge the potential availability of equitable tolling.[3] It would have been futile for the State to have done so. The district court was bound by the Ninth Circuit's prior decisions holding that equitable tolling is available, and the Ninth Circuit would have followed its own case law. In any event, there is a world of difference between "endorsing" a legal proposition and merely failing to take it on directly. Nothing about the position the State takes now "contradicts" the position it has taken earlier in this litigation. The State always has insisted that respondent is not entitled to equitable tolling.

In addition, and even if the State's failure to have raised the issue below meant that it could not directly raise the issue now, if this Court were to grant certiorari on some other question or questions presented in the State's petition, the Court could consider the additional legal issue of the availability of equitable tolling in a section 2254 case. Once this Court's jurisdiction has attached, "consideration of issues not present in the jurisdictional statement or petition for certiorari *and not presented in the [lower court]* is not beyond [the Court's] power, and in appropriate circumstances [the Court] ha[s] addressed them." *Vance v. Terrazas*, 444 U.S. 252, 258-59 n. 5 (1980) (emphasis added). It would be appropriate to discuss this important legal issue here because of the significant interest that the States, habeas petitioners, and lower federal courts have in the issue, and because it logically underlies the other issues involving equitable tolling that are raised in the petition.

---

[3] As noted in the petition, however, in its Ninth Circuit brief the State pointed out that this Court had not decided the issue. (Appellee's Br. 30 n. 7, citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 n. 8 (2005)).

The cases on which respondent relies as indicating that the State cannot pursue the issue of the availability of equitable tolling are inapposite. Respondent cites *Baldwin v. Reese*, 541 U.S. 27 (2004) (Opp. Br. 3-4), but there the Court observed that "[u]nder this Court's Rule 15.2, 'a nonjurisdictional argument not raised in a respondent's brief in opposition to a petition for a writ of certiorari may be deemed waived.'" *Id.*, 541 U.S. at 34. That rule, and that holding, do not apply here.[4] Respondent cites *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). (Opp. Br. 4). In that case, the Court held that an issue not raised by a respondent in the courts below was "waived." *Id.*, 537 U.S. at 56 n. 4. Nothing in the Court's opinion suggests that the courts below had ruled on the issue, however, and that fact distinguishes this case from that one. Respondent also relies on *Roberts v. Galen of Va., Inc.*, 525 U.S. 249 (1999) (*per curiam*). (Opp. Br. 4). There, this Court refused to consider two alternative grounds for affirmance offered by the respondent because they "do not appear to have been sufficiently developed below for [the Court] to assess them." *Id.*, 525 U.S. at 253-54. Because the equitable tolling issue here is a legal one, there is no factual record that needed to be "sufficiently developed below." Thus, this decision too is inapplicable. Finally, respondent cites *New Hampshire v. Maine*, 532 U.S. 742 (2001). (Opp. Br. 4). In that case, in listing the factors that "typically inform the decision whether to apply the doctrine [of judicial estoppel] in a particular case," this Court stated that "a party's later position must be 'clearly inconsistent' with its earlier position" and that "courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position * * *." *New Hampshire v. Maine,* 532 U.S. at 750. As discussed, the State's position now

---

[4] Moreover, in *Reese* the Ninth Circuit had not passed on the issue that respondent raised in his merits brief. *Id.*

is not inconsistent, "clearly" or otherwise, with its earlier stance in this case, and the State did not "persuade" the courts below that equitable tolling is available. They already were persuaded, and it was respondent who contended that he is entitled to equitable tolling.

On the merits of the State's claim that equitable tolling is not available in a case brought under section 2254, respondent contends that "it is settled that the [AEDPA] statute of limitations is subject to equitable tolling." (Opp. Br. 4) (citation omitted). The issue is not "settled" in this Court, however. If it were, this Court would not have twice pointed out, the last time quite recently, that this Court has not yet ruled on the issue. *Lawrence v. Florida*, ___ U.S. ___ (2/20/07) (slip op. 8) ("We have not decided whether § 2244(d) allows for equitable tolling," but assuming it does because the parties proceeded on that assumption); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 n. 8 (2005) (same). Moreover, although respondent is correct in asserting that there is no circuit split on the issue (Opp. Br. 4), that hardly offers any solace to the States if the circuits that have ruled on the issue have all gotten it wrong, leading to much unnecessary litigation over the precise contours of equitable tolling in the habeas corpus setting.

Respondent also contends that this Court's decisions in *United States v. Brockamp*, 519 U.S. 347 (1997), and *United States v.* Beggerly, 524 U.S. 33 (1998) — relied on by the State in its petition (Pet. Cert. 13-14) — are inapplicable and "have] nothing to say" in this context because they are about tax law and the quiet title act, respectively, and because habeas corpus is an equitable remedy. (Opp. Br. 6). Respondent misunderstands the basis for the State's reliance on *Brockamp* and *Beggerly* and why they are significant here. The important teaching of *Brockamp* is, as this Court later stated in *Beggerly*, 524 U.S. at 48, that "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant stat-

ute." The State's point is not that *Brockamp* and *Beggerly* are directly applicable here, but that the text of section 2244(d) also is inconsistent with equitable tolling and that the lower federal courts that have ruled that equitable tolling is available have failed to give due attention to the statutory text. *See Brockamp*, 519 U.S. at 351-52 (relying on the "explicit exceptions" to the time limits set out in the statute and on the statute's detail); *Beggerly,* 524 U.S. at 48 (concluding that equitable tolling is inconsistent with the statute at issue there, in part because the statute effectively already provided for equitable tolling because it started the clock running when the plaintiff knew or should have known of the claim).[5]

In arguing that equitable tolling is available, respondent also insists that "[c]learly, states should not be able to rely on their own wrongdoing to preclude the federal courts from considering exceptional circumstances that prevent an incarcerated person from filing his petition on time." (Opp. Br. 7) (citation omitted). That assertion, far from advancing respondent's argument, helps to make the State's point that section 2254(d)(1) is a completed Congressional statement about when the statute of limitations should be tolled. One of those circumstances is when a State has created an impediment "in violation of the Constitution or laws of the United States[.]" 28 U.S.C. § 2254(d)(1)(B).

---

[5] 28 U.S.C. § 2244(d)(D) states that the limitations period runs from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Thus, it, like the statute under scrutiny in *Beggerly*, already effectively allows for equitable tolling. Section 2254(d) is set out in full in the petition. (Pet. Cert. 1-2).

C. The Ninth Circuit set the bar for obtaining an evidentiary hearing far too low; its approach conflicts with that of other circuits.

In its petition, the State argued that the Ninth Circuit was requiring much too little from federal habeas petitioners to obtain an evidentiary hearing on equitable tolling. (Pet. Cert. 20-23). Relying in part on its petition filed in *Kephart*, the State contended that the Ninth Circuit's approach, in addition to being too lax, conflicted with the approach taken by other federal courts of appeals. (Pet. Cert. 20-22). The State argued that in this case the Ninth Circuit compounded the error it made in Kephart's case when it took an approach that is inconsistent with and even less demanding than that taken by the court in that earlier decision. (Pet. Cert. 22).

As discussed above, respondent does not contend that there is no circuit split or dispute that the Ninth Circuit is reaching inconsistent results. (Opp. Br. 8-9). Instead, his first response is that the decision in this case is unpublished. (Opp. Br. 8). That fact is true, but it in no way precludes this Court's review. On more than one occasion, this Court has granted certiorari in cases where the Ninth Circuit's disposition was not published. *See, e.g., Behrens v. Pelletier*, 516 U.S. 299, 305 (1996); *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 452-54 (1993); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 13-14 (1987);[6] and *United States v. Janis*, 428 U.S. 433, 439 (1976).

---

[6] Although this Court's decision may not make it entirely clear, the Ninth Circuit's decision in that case was unpublished. *Iowa Mutual Ins. Co. v. LaPlante*, 774 F.2d 1174 (9th Cir. 1985).

Respondent also contends that "courts within the Ninth Circuit strictly enforce the timetable mandated by 28 U.S.C. § 2244(d)" and that "evidentiary hearings on equitable tolling are rare within the Ninth Circuit." (Opp. Br. 9). As explained in the State's reply brief in *Kephart* (at 4-5), those assertions, assuming they are accurate, are irrelevant to the State's concerns. The State's concerns are not with past practice, but with broad legal issues that are of great significance to the States, habeas petitioners, and lower federal courts, and with what may happen in the future.

CONCLUSION

For the reasons given in the petition for certiorari and in this reply brief, petitioner respectfully requests that this Court grant the petition for certiorari and reverse the decision of the court below.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS
Solicitor General
JANET A. METCALF
Assistant Attorney General
Counsel for Petitioner

March 13, 2007